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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of	)	
	)	
Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996	)	MM Docket No. 97-247

To: The Commission

COMMENTS OF FOX TELEVISION STATIONS INC.

Fox Television Stations Inc. ("Fox"), hereby submits its Comments in response to the Commission's December 19, 1997 Notice of Proposed Rulemaking in the above-captioned proceeding.

This proceeding was undertaken in order to implement the Congressional directive contained in Section 336(e)(1) of the Telecommunications Act of 1996. That provision requires the Commission, as part of its implementation of a transition to digital television ("DTV"), to establish a program to collect fees in connection with the distribution by a broadcast television licensee over its allotted DTV spectrum of "any ancillary or supplementary services" for which the broadcaster receives subscription fees or any other compensation apart from that received from the sale of commercial advertisements. */ The Commission has

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*/ See 47 U.S.C. § 336(e)(1)(A) (fees to be collected with respect to services "for which the payment of a subscription fee is required," and (B) (fees to be collected with respect to services "for which the licensee . . . receives compensation from a third party in return for transmitting material furnished by such third party").

solicited comments on the possible bases for valuing the spectrum used for the distribution of such services, and the appropriate methodology to capture that value.

These Comments and the accompanying paper prepared by Strategic Policy Research, "The Need for a Cap on Fees for Ancillary or Supplementary Use of Digital Television Spectrum" (the "SPR Paper") (attached hereto), focus on a single, critical component of any fee program: the need to establish a cap on the aggregate payments made by any broadcaster for feeable services it provides over its licensed DTV spectrum. As explained in the SPR Paper (at 4-5), a cap is require by the explicit language of the statute. Moreover, failure to establish a fee cap would, among other things, create a substantial disincentive to innovation in the delivery of non-broadcast services over DTV spectrum, while placing broadcasters at a competitive disadvantage vis-à-vis established providers of video, data and voice services. Id. at 5-7.

The plain language of the 1996 Act, and its legislative history, both demonstrate that Congress intended to impose an upper bound on the amounts broadcasters should be required to pay for the use of their allotted DTV spectrum to provide feeable ancillary or supplementary services. Indeed, Section 336 mandates that the revenues collected in connection with such uses generate "an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered" by means of competitive bidding. 47 U.S.C. § 336(e)(2)(B). The Conference Report accompanying the 1996 Act is explicit on this point: "The fee . . . cannot exceed the amount, on an annualized

basis, paid by licensees providing competing services on spectrum subject to auction." H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 159 (1996). Similarly, the Report of the House Commerce Committee accompanying H.R. 1555, one of the precursers of the 1996 Act, emphasized the Committee's intent "that the Commission establish fees which are, to the maximum extent feasible, equal to but do not exceed (over the term of the license) the amount the public would have received had the spectrum for such services been auctioned publicly . . . ." H.R. Rep. No. 204, 104th Cong., 1st Sess. 117 (1995).

The intent of Congress is clear. Broadcasters providing feeable ancillary and supplementary services over a portion of their DTV spectrum must not pay more for the right to use that spectrum to provide such services than they would have paid had they acquired the spectrum at auction. As demonstrated in the SPR Paper, a fee cap is an essential means to ensure compliance with this statutory mandate. It is also essential to the most innovative uses of DTV spectrum, and to fair and equitable treatment of broadcasters in the digital age.

Accordingly, for the reasons stated herein and in the SPR Paper, Fox urges the Commission to establish a cap on the aggregate amount of fees payable by broadcasters in connection with their provision of feeable ancillary and supplementary services over their allotted DTV spectrum.

Respectfully submitted,

FOX TELEVISION STATIONS INC.

By: _____

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The Need for a Cap on Fees for Ancillary or Supplementary Use of Digital Television Spectrum

May 1998

Summary

The Telecommunications Act of 1996 ("1996 Act") charged the Federal Communications Commission ("FCC" or "Commission") with establishing fees to recover a portion of the value of the digital television spectrum to the extent that it is used for ancillary or supplemental services for which the broadcaster receives a subscription fee ("feeable services"). The Act mandates — and fundamental economic principles require — the Commission to determine a cap on such fees to protect broadcasters from having to pay more for the right to use the digital spectrum for feeable services than they would have paid had the spectrum been auctioned.

A cap is required to ensure equity among competing providers. If broadcasters are forced to pay more than a reasonable estimate of what the spectrum is worth, they will be unfairly burdened in competition with other suppliers of subscription services. In addition, failure to adopt a cap at this time would expose broadcasters to unnecessary risk and, therefore, make them less willing to make the investments needed to offer ancillary or supplementary services. A cap is also important to ensure that enterprising broadcasters who are successful in developing and marketing feeable services are not penalized by paying more than the value of the spectrum over time.

The Commission has a variety of approaches it could take to develop the kind of "rough justice" estimate of spectrum value the 1996 Act requires. Any estimation technique it uses should reflect the fundamental principle that, as the supply of available spectrum increases, the value of each additional block of spectrum decreases. This principle has been reflected in the declining values for spectrum that has recently been awarded by auction and in the Commission's request to Congress that additional wireless service auctions be postponed. The risks of setting an unreasonably high cap are the same as those associated with setting no cap; that is, broadcasters will be less inclined to make the investments needed to deploy ancillary and supplementary services, and the public will lose potentially valuable service options.

Introduction

In this proceeding, the FCC is implementing the requirements of the 1996 Act relating to the establishment of fees for ancillary or supplementary use of digital television (DTV) spectrum.[1] Congress has directed the Commission to establish "a fee program" for any ancillary or supplementary services for which the broadcaster charges a subscription fee or is otherwise compensated apart from the sale of commercial advertising (so-called "feeable services").

This paper addresses a critical element of such a fee program — the need for a cap on the payments made by broadcasters for feeable services. A cap is essential to meeting the 1996 Act's explicit requirement that the fees recover an amount that "does not exceed (over the term of the license) the amount that would have been recovered had *such services* been licensed"[2] by the use of competitive bidding, *i.e.*, by auction. In light of this statutory imperative, a cap on fees is essential to implementation of Congressional intent. Moreover, we believe that a cap is required by fundamental principles of economics and equity.

At the outset, it is important to emphasize that the Commission is not acting in a vacuum as it proceeds to establish this fee program. The following points must be carefully noted about § 336:

1) The spectrum being awarded is to be used by broadcasters to provide advanced television services (ATV), including advertiser-supported "free" digital television from which the public will be deriving benefits much as they are from the analog service today;

2) Broadcasters are required to return their existing analog spectrum as a condition of receiving the ATV spectrum;

3) Requiring a fee program for ancillary and supplementary services offered over the ATV spectrum is intended "to recover for the public *a portion of the value* of the public spectrum resource *made available for commercial use*" (emphasis added) and to "avoid unjust enrichment" of the broadcaster; and

4) As noted above, the fee program should recover an amount not to exceed the value which the spectrum used for feeable services would have brought in an auction.

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1 14 U.S.C. 336(e)(1).

2 14 U.S.C. 336(e)(2) (emphasis added).

In addition to these requirements, the 1996 Act left unchanged two fundamental elements of the Communications Act. First, the Commission may only grant a license for a period of years.[3] Second, a station license does not vest in a broadcaster any right to use the spectrum beyond the term of its license.[4] These elements suggest that the appropriate analogy for the relationship being established under the fee program is a lease under which the lessee obtains the right to use a resource (in this case, a non-depleting use), but does not acquire an actual ownership interest in the resource. The lease payment becomes, in effect, a carrying charge by which the lessee pays interest but no principal. As we later discuss in more detail, the lease can be a model on which the Commission structures its fee program.

In addition to what the statute requires, the Commission must bear in mind that the fee program it establishes (*both* in terms of the level of the fees *and* an appropriate cap) will have a direct impact on how quickly and how aggressively broadcasters take advantage of the flexibility the 1996 Act provides for ancillary or supplementary uses of the DTV spectrum.[5] The Notice recognizes at several places that if the FCC fails to act wisely and in accordance with sound principles of economics and equity, it will create substantial barriers to use of this resource. This result would clearly run counter to Congressional intent and to the public interest by depriving the public of potentially valuable services.

With these thoughts in mind, we turn to a discussion of why a cap on fees paid under § 336 is necessary (indeed, as we read the statute, required). We then suggest how the spectrum value might be estimated for purposes of establishing a cap consistent with the intent of Congress and with the goal of encouraging the maximum degree of innovation and risk-taking on the part of broadcasters. Finally, in the Appendix, we provide a hypothetical example of how an appropriate fee program might be structured.

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[3] 47 U.S.C. 307(c). The 1996 Act extended the maximum term of television broadcast licenses from five to eight years.

[4] See 47 U.S.C. 309(h).

[5] While the 1996 Act refers to "advanced television services," the Commission's Notice uses the term digital television or DTV. We adopt the FCC's terminology from this point on.

The Importance of a Cap on Payments for Feeable Services

There are three principal reasons why a cap on the payments made by broadcasters for use of the DTV spectrum for feeable services is an essential component of the Commission's fee program. First, such a cap is required by the 1996 Act. Second, a cap will ensure that there is equity among competing providers of ancillary and supplementary services (*viz.*, broadcasters themselves as well as non-broadcast providers such as cable, telephone and satellite companies). Third, by establishing a cap at the outset, the FCC can carry out its statutory obligations while eliminating the economic uncertainty of an open-ended fee program, which, in turn, would discourage the development and launch of innovative ancillary or supplementary digital services. We now elaborate on each of these points.

A. A cap is required by the 1996 Act.

The 1996 Act clearly envisions that the FCC will establish a cap or upward bound on the fees it collects from broadcasters for the use of the DTV spectrum for ancillary or supplementary services. Indeed, the 1996 Act explicitly requires that the fee recover "an amount that, to the extent feasible, *equals but does not exceed* (over the term of the license) the amount that would have been recovered"[6] in an auction.

It is admittedly difficult — and perhaps inevitably somewhat arbitrary — to estimate the value of the spectrum in question in the absence of an auction. Indeed, the rationale for auctions is largely their ability to do what analysis cannot do. If you could know what the results of an auction were going to be in advance, you would not need to hold it. The task is made even more complex by the fact that the value being "measured" is only the value that attaches to the spectrum being used for feeable services which itself will, as the Commission notes, vary from broadcaster to broadcaster, from service to service, by time of day, and even by day of the week.

However, because an exercise is difficult and may produce inexact results does not mean express statutory language can be ignored or that the approach Congress intended is infeasible. Thus, we are concerned about the suggestion in the Notice that fees can (even should!) be set without any reference to an estimate of the potential auction value of the spectrum operating rights being

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6 *Id.* at 336(e)(2)(B) (emphasis added).

utilized. Without an explicit linkage to the hypothetical auction value, broadcasters lose a valuable protection afforded by the 1996 Act; that is, a check on the over-recovery of scarcity values. As we discuss subsequently, the failure to establish a cap at the outset greatly increases the risk and uncertainty broadcasters face in developing ancillary or supplementary services using the DTV spectrum with the likely result that the public will lose important new service options. Thus, we believe that an estimated auction value must be established at the outset to ensure that broadcasters pay no more than what the spectrum is deemed to be worth, over the term of a license.[7]

In our view, Congress expects the Commission to make an informed estimate. It expects the Commission to come as close to the estimated auction value as is feasible under the circumstances. We suggest in a subsequent section several approaches the Commission might take in arriving at the kind of "rough justice" estimate that would satisfy Congressional intent.

B. A cap is required to ensure equity among competing providers.

There is an important equity argument for establishing an explicit cap on the payments that broadcasters make for the use of the DTV spectrum for feeable services. While it may be fair to require broadcasters to pay for the spectrum they use to compete in the offering of feeable services,[8] it would most certainly be unfair to burden broadcasters with fees that recover more than the value of what they are receiving (which is the right to use some portion of the DTV spectrum for subscription services).

In every instance we can imagine, broadcasters will be competing against well-established providers of video, data and voice services (*viz.*, cable companies, cellular/PCS providers, satellite systems and telcos). In some cases, these firms received valuable spectrum rights without paying for them. In other instances, competitors have been assigned spectrum rights that are much more expansive than those being assigned to broadcasters. To the extent that broadcasters are unfairly

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[7] This is not to say that the fee need be tied directly to an estimate of auction value. The fee should be established in a manner appropriate for the ancillary and supplementary uses contemplated by the 1996 Act, and not to yield the estimated auction revenues over some arbitrary period. This is an important distinction.

[8] We note that broadcasters are able to (and do) use portions of their existing analog spectrum (*e.g.*, the vertical blanking interval) to provide subscription services today without paying a fee. This fact, coupled with the fact that broadcasters are, in effect, being compelled as a matter of government policy to incur considerable, non-remunerative up-front costs to deploy digital television capability, should be taken into account by the FCC in balancing the equities among broadcasters and other providers.

burdened with spectrum fees and must compete with the already established offerings of their competitors, broadcasters enter the marketplace with two strikes against them.[9]

If the Commission wants the promise of additional competition to materialize, it must be careful to establish a fee system that does not unduly burden broadcast competition.

A cap is also essential to preserve equity among competing broadcasters. This point is addressed in the next subsection in the context of a more general concern about not penalizing success.

C. A cap is required so that the fee program does not deter investment and innovation, or "penalize success."

We are urging — indeed, we believe the 1996 Act requires — the Commission to establish a cap at the front end that puts an upward bound on what *any* broadcaster will pay. Failure to do so creates undue risk and uncertainty for broadcasters who already face substantial competitive risks. For example, after the exchange of analog for digital spectrum, each broadcaster will still be limited to 6 MHz of spectrum, yet will be competing against firms that have much greater bandwidth, interactive capability and, in the case of DBS, a larger footprint. Thus, for the most part, we envision feeable services as filling niches in existing markets. Broadcasters will be a lot less likely to deploy facilities and to assume the financial risk associated with developing such feeable services if they are faced with an open-ended series of fee payments and with no way of knowing when they will have made adequate payment for the rights they have been assigned.

Without a cap, broadcasters that are the most successful in "mining" this resource will face the prospect of paying more for the spectrum. In that event, the fee has become a tax, unfairly burdening those broadcasters who do the best job of utilizing the spectrum for ancillary and supplementary services. This will discourage the most aggressive and innovative uses of the DTV spectrum, a result that hardly serves the public interest.

We appreciate that Congress has also required the Commission to design the fee "to avoid *unjust* enrichment" (emphasis added). What this language suggests, however, especially when considered in the context of § 336 in its entirety, is that the FCC should not set the fee so low as to

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[9] It is, therefore, not surprising to see broadcasters' competitors arguing for high spectrum fees for ancillary or supplementary services.

give *all* broadcasters a "free ride." What it most certainly does not suggest is that the Commission should establish a fee program that penalizes success by taking more from *a particular* broadcaster who happens to be more innovative in using the resource. Each broadcaster should pay up to the value of the spectrum they are using for feeable services, but no more than that. Establishing a cap as part of the fee program will help ensure this result. Otherwise, the government may, in effect, be appropriating a broadcaster's productivity and creativity under the guise of collecting spectrum fees.

Setting the Spectrum Fee Cap

The first step in setting the required spectrum fee cap is to estimate the value of the portion of the DTV spectrum that may be used for feeable services. There are several possible bases for the kind of "rough justice" calculation that seems to be required by § 336(e)(2)(B).[10] For example, the Commission might use the CBO estimate of the amount that would have been received in an up-front auction of the commercial DTV spectrum in 1998 adjusted downward to account for the fact that most of the spectrum value identified by CBO is attributable to the provision of advertiser-supported free television.[11] While it is impossible to predict with precision how much spectrum will be devoted to feeable services for the broadcast industry as a whole or with fairness to any one broadcaster (whose usage of spectrum for feeable services may diverge from the norm),[12] we believe it is entirely reasonable to assume that, on average, only a relatively small portion of the available bit-stream will be used for ancillary or supplementary services.

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[10] In implementing the sections of the 1996 Act relating to opening local telephone markets to competition, the FCC has been willing to rely on extremely arbitrary estimates of the costs of a purely hypothetical network in setting prices for "unbundled network elements." The exercise required under § 336 is far less arbitrary and the results are likely to be far less off the mark given the information available to the Commission as a result of other auctions that might be used to make this calculation.

[11] *See* U.S. Congress, Congressional Budget Office, *Where Do We Go From Here? The FCC Auctions and the Future of Radio Spectrum Management* (Wash. D.C.: USGPO, April 1997). To begin with, feeable services account for a small portion of CBO's estimated value. The CBO exercise also assumed the continuation of analog television. Non-feeable services would thus have a higher economic value today under the "give-back" arrangement embodied in the 1996 Act than under the CBO estimate. This calculation might produce a total industry cap in the range of 10 percent of the CBO estimate.

[12] The Commission could establish a cap for each station based on the actual bit-stream dedicated to feeable services, but the complexity of using such a calculation for both the broadcasters and the Commission creates the very administrative burdens the Commission wants to avoid. *See* Notice at ¶ 9.

Alternatively, the Commission could set the cap by "backing out" the portion of the spectrum that broadcasters will require to continue providing a single channel of free, advertiser-supported television in the new digital format. Since the remaining spectrum (or bit-stream) *could* be used for feeable services, the cap could be set accordingly. While intellectually defensible as a basis for making the "rough justice" calculation, we believe this approach would result in an unduly high cap at least as a measure of average usage by the broadcast industry as a whole.

Another basis for the spectrum value calculation might be to use the FCC's recent auction of licenses for local multipoint distribution services (LMDS). Since that set of licenses embodies operating rights that are likely to be significantly more valuable than the rights in question here, the LMDS values also likely considerably overstate the value of DTV spectrum that broadcasters might use to supply ancillary or supplementary services. These values, however, can be discounted to reflect more realistic expectations of the DTV spectrum's value for supplying ancillary and supplementary services.

While there may be other approaches to making the kind of "rough justice" calculation required by § 336, we note generally that the auction value of new spectrum has been declining. Not only did the LMDS auctions fail to produce the expected revenues, but the Commission has also asked Congress to delay the deadline for auctioning off additional wireless spectrum because of lack of interest in the auction.[13] These results are not surprising given the fundamental principle of supply and demand. As the FCC has made more spectrum available (and especially spectrum that can be used flexibly), the value of additional blocks of spectrum has fallen. This trend implies a very low value (and, consequently, low cap) for the portion of the DTV spectrum broadcasters might use to provide feeable services. Setting a cap that is too high can have the same effect as having no cap at all, *viz.*, broadcasters will be less inclined to deploy feeable services and the public will lose potentially valuable service options.

Structuring an Appropriate Fee Program

The remaining question then is: How should a cap be embodied in an appropriate fee program? Several approaches are possible. One would be simply to estimate an average "per

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[13] *See* "Kennard Asks to Delay Next Wireless Auction," *Communications Daily*, April 30, 1998 at 1.

licensee" spectrum value and charge a broadcaster annual fees until the cap is reached. From that point on, presumably, the broadcaster would make no further fee payments. For example, assuming the cap has been reached, fees do not start accumulating again when a license is renewed.

While this approach would be simple to administer, it has some attendant risks. In the first place, it may induce the Commission to set a higher cap than is warranted and/or to establish a fee that is too directly tied to the estimate of auction value. Second, it may deter optimal behavior by broadcasters by siphoning off too much revenue early in the life cycle of a new enterprise.

There is another approach which may be preferable and for which a lease analogy can serve productively as a model. It involves the use of annualized caps. We describe how such an approach might be implemented in the attached Appendix.

Conclusion

A cap on the fees broadcasters pay for the use of the new digital television spectrum to provide ancillary or supplementary services is required by the 1996 Act. Establishing such a cap now will also serve to reduce the risks faced by broadcasters who contemplate offering subscription services and make it more likely that these services will be offered — and that they will become available sooner — with corresponding benefits for the public. The FCC has a number of estimation "tools" it can use to develop a "rough justice" cap. The Commission should be careful not to set the cap so high as to penalize broadcasters and, thereby, deter investment and innovation.

APPENDIX

A Possible Approach for Structuring and Implementing a Fee Cap

As noted, the Communications Act does not create any right in the spectrum being used for DTV beyond the term of the license (up to eight years).[1] Thus, broadcasters' use of the spectrum is closely analogous to a lease, and the appropriate way to think of the fee payments broadcasters are making for the use of the DTV spectrum to provide ancillary or supplementary services is as lease payments. Lease payments are typically fixed over the life of the contract and cover the carrying charges (or interest payments) appropriate for a particular transaction. Under a lease, the lessee is paying only interest, not principal, since it acquires no interest in the property beyond the right to use it subject to terms of the lease (in this case, the license).[2]

A simple hypothetical example will show that a fee program could incorporate the lease analogy to establish an annualized cap on spectrum value.

Assume that the Commission has estimated the value of a DTV channel to be $10 million. Assume further that a "rough justice" approximation indicates that the typical DTV licensee will use perhaps 5-10 percent of the associated digital bit-stream (on average over the license term) to provide feeable services. This suggests an upward bound on the spectrum value for that portion of the DTV channel of $1 million. Using our lease analogy, we must next determine what the appropriate carrying charge or interest rate should be. For ease of calculation, we assume a 10 percent annual interest rate.[3] Applying this percentage to the $1 million asset value yields an annual amount of $100,000. This latter figure could serve as a form of annualized cap; that is, it represents an upper bound on what a broadcaster should pay in any given year, *viz.*, the annual carrying charge.

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[1] While there may be no property right created in the spectrum, broadcasters do have an expectancy of renewal which has been established under the 1996 Act. See 47 U.S.C. 309(k).

[2] This is clearly the case where, as here, the use is non-depleting; that is, the same spectrum will still be available for re-use at the end of the license term.

[3] In reality, this rate may be high since there is little risk to the government that broadcasters will default on their payments given that they stand to lose their license and their ability to use the *entire* channel by so doing.

What a broadcaster actually pays in any given year will depend on whether it actually uses any of the spectrum for feeable services. If it does not, it pays nothing. However, if it does, there needs to be a basis for assessing the licensee for that usage. The Commission's Notice provides extensive discussion of a number of alternatives for calculating annual fees and the consequences of adopting each alternative. For purposes of completing our hypothetical example, we assume that the Commission adopts a fee based on gross revenues (which we favor for its fairness and administrative simplicity).

The remaining question is what the percentage rate of fee should be. The Commission understands the parameters within which it must make this decision. On the one hand, the rate should be set at a level that does not arbitrarily dissuade broadcasters from providing feeable ancillary or supplemental services. On the other hand, the fee must recover at least a portion of the value of the spectrum used for feeable services and avoid unjust enrichment. The Notice suggests a range of between 1 and 10 percent. Our hypothetical example uses 5 percent, the mid-point of this range.

The following table illustrates the fee system we have described as it would apply to two stations with very different growth rates of gross revenues for feeable services.

Table 1 Hypothetical Spectrum Fee Calculation		
Estimated Bit-stream Value: $1,000,000 Interest Rate: 10% Annualized Cap: $100,000		Fee: 5% of Gross Revenues from Feeable Services
Station A		
Year	**Gross Revenues ($)**	**Payment ($)**
1	0	0
2	500,000	25,000
3	1,500,000	75,000
4	3,000,000	100,000
5	6,000,000	100,000
6	10,000,000	100,000
7	14,000,000	100,000
8	18,000,000	100,000
Station B		
Year	**Revenues ($)**	**Payment ($)**
1	0	0
2	0	0
3	0	0
4	500,000	25,000
5	1,500,000	75,000
6	3,000,000	100,000
7	6,000,000	100,000
8	10,000,000	100,000

Note the results of including the annualized cap. Stations A and B start out with the same resources and the same opportunities for developing feeable services. Station A is either more

aggressive or more successful (or both) and ends up after eight years paying $600,000 in fees. Station B, on the other hand, has generated less gross revenue and pays only $400,000 in fees.

Consider the results without the annualized cap. Station A would have paid roughly $2.7 million in fees during the period, while Station B would have paid roughly $1.1 million. Both stations would have paid more than the value of the spectrum, expressed either in terms of the estimated spectrum value ($1 million) or of the total of the annualized cap amounts ($800,000). This result would be contrary to the statutory directive that fees not exceed the value of the spectrum.[4]

Without a cap, Station A would also have paid more than twice what Station B paid for the use of the same resource. This outcome has the effect of penalizing Station A for its success. With the annualized cap in place, a discrepancy in the total fees paid by the two stations during the period would still exist, but would be considerably smaller ($200,000), thereby imposing less of a penalty.

To the extent that one is concerned about the actual payments of broadcasters falling too far below the estimated value over the term of the license (and somehow constituting unjust enrichment), the fee program could be designed to include an annual cap carry-forward obligation. Including such a feature might make it easier for the Commission to justify setting the percentage rate at the low end of the range (thereby not unduly burdening broadcasters and frustrating the development of new services) while at the same time ensuring that the government recovers the appropriate value of the asset being used. It might also be a way of recovering the value associated with the expectancy of renewal. In the above hypothetical, in any year in which the fee generated was less than the $100,000 cap, the unmet obligation would be carried forward to successive years and would have to be satisfied to the extent that fees generated exceed the annualized cap in those years. The results are shown below in Table 2.

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[4] We recognize that the Commission might be inclined to set a very high cap precisely to avoid this result. However, we believe that the Commission's estimate of a cap must be grounded in reality, *e.g.*, an informed estimate taking into account the actual results of other auctions such as those for LMDS licenses. *See* discussion at page 8.

Table 2
Hypothetical Spectrum Fee Calculation
With Cap Carry Forward

Estimated Bit-stream Value: $1,000,000 **Interest Rate:** 10% **Annualized Cap:** $100,000	**Fee:** 5% of Gross Revenues from Feeable Services

Station A

Year	Gross Revenues ($)	Payment ($)	Cap Carry Forward ($)
1	0	0	100,000
2	500,000	25,000	175,000
3	1,500,000	75,000	200,000
4	3,000,000	150,000	150,000
5	6,000,000	250,000	0
6	10,000,000	100,000	0
7	14,000,000	100,000	0
8	18,000,000	100,000	0

Station B

Year	Revenues ($)	Payment ($)	Carry Forward ($)
1	0	0	100,000
2	0	0	200,000
3	0	0	300,000
4	500,000	25,000	375,000
5	1,500,000	75,000	400,000
6	3,000,000	150,000	350,000
7	6,000,000	300,000	150,000
8	10,000,000	250,000	0

Under this scenario, at the end of eight years, the government has collected $800,000 from both broadcasters for use of the spectrum for feeable services. Thus, both stations can be said to have, by analogy, covered the carrying charges associated with their use of the DTV spectrum for feeable services. Station A was more successful in developing feeable services (a result the FCC should be encouraging), paid more in fees to the government sooner, and was generating enough gross revenue to satisfy its carry-forward obligation at the end of year five. Station B started more slowly, began making fee payments later, and did not satisfy its carry-forward obligation until the end of year eight (which happens to coincide with the end of its license term).[5]

The carry-forward obligation can be seen to equalize conditions between the two broadcasters. In the long run (over eight years in the hypothetical), each broadcaster will have paid (roughly, given inflation) the same amount for use of the spectrum.

[5] In the event that a broadcaster had not met its carry-forward obligation at the end of a license period, the obligation could simply be extended into the next license period (and beyond), assuming the license is renewed, until it is met. This may be appropriate in view of the renewal expectancy. If the license is not renewed or is otherwise transferred, any remaining "balance" could become the obligation of the transferee.

CERTIFICATE OF SERVICE

I, LaVonnia Brown, do hereby certify that on this 4th day of May, 1998, copies of the foregoing "Comments of Fox Television Stations Inc." were delivered by hand to the following parties:

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